

**International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (Crossing Guard Productions, Inc.) and Jay Koiwai.** Case 31-CB-9308

March 22, 1995

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND REMANDING**

BY MEMBERS STEPHENS, COHEN, AND  
TRUESDALE

Upon a charge filed by Jay Koiwai, an individual, on April 28, 1994,<sup>1</sup> and a first amended charge on June 20, the General Counsel of the National Labor Relations Board issued a complaint on June 10, and a first amended complaint on June 22, against International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO (IATSE), the Respondent, alleging that it has violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act. Copies of the charges and the complaint were properly served on the Respondent. The answer to the original complaint was due June 24, and the answer to the amended complaint was due July 6. Counsel for the General Counsel, by letter dated July 13, notified the Respondent that unless an answer was filed by the close of business on July 25, a Motion for Summary Judgment would be filed. On July 26, the Respondent faxed its answer with an accompanying letter to the Regional Office. On July 27, the Respondent filed an answer by mail with the Regional Office.

On July 29, the General Counsel filed a Motion to Transfer Case to and Continue Proceedings before the Board and for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment, with exhibits attached. On August 1, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On September 1, the Respondent filed a brief in opposition to the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The complaint alleges, inter alia, that Koiwai, who was hired by the Employer, Crossing Guard Productions, Inc., worked the requisite number of days for the Employer to qualify for placement on its Industry Experience Roster, and that the Respondent objected to the placement of Koiwai on the Industry Experience Roster, thereby precluding the placement of Koiwai on the roster. The complaint also alleges that the Respondent engaged in this conduct for unfair, arbitrary,

and invidious reasons, thereby violating Section 8(b)(1)(A) and (2) of the Act.

By the fax received by counsel for the General Counsel on July 26, the Respondent admitted, denied, and claimed lack of information regarding the various allegations in the first amended complaint.<sup>2</sup> On the same date, counsel for the General Counsel signed the above-referenced motion. On July 27, counsel for the General Counsel received by mail an original signed copy of the previously faxed answer.

The Respondent avers without dispute that prior to July 26, the Respondent and counsel for the General Counsel had several conversations, in which the counsel for the General Counsel was informed that the Respondent was having a difficult time confirming certain facts necessary for filing an accurate answer. On July 26, the same day the Motion for Summary Judgment was signed, the Respondent's attorney telephoned counsel for the General Counsel and informed him that a response to the first amended complaint was being sent that day by overnight courier and that a copy of the response was being faxed that day. There is no evidence that counsel for the General Counsel indicated at that time that these responses would be untimely. Indeed, counsel misunderstood the Respondent; he thought the Respondent was sending its response by messenger on that day. Of course, that was not the Respondent's intent. Accordingly, on July 27, the Respondent was advised that its response was received via fax but that it was rejected because filing of an answer by fax is not permitted under the Board's Rules and Regulations. After receiving this notice, the Respondent explained to counsel for the General Counsel that the July 26 fax was sent, not as the Respondent's formal answer to the amended complaint, but rather to put the General Counsel on notice that the original response would be delivered via courier the next day. Based on the aforementioned misunderstanding, the Respondent maintains that the General Counsel's Motion for Summary Judgment should be denied.

Having duly considered the matter, we find that summary judgment is not appropriate here. On the basis of all the foregoing, we find that the Respondent's failure to file a timely answer was excusable and appears to be the product of a misunderstanding between the Respondent and counsel for the General Counsel regarding the form in which the answer was being sent. Absent this misunderstanding, counsel for the General Counsel could have informed the Respondent that its plan (fax on July 26, original on July 27) was deficient. In addition, we note that the Respondent's delay of 2 days in filing an original copy of its answer would not have postponed a resolution of

<sup>1</sup> All dates are 1994 unless otherwise indicated.

<sup>2</sup> The original complaint had been issued on June 10, 1994, and it was superseded on June 22 by the first amended complaint, 2 days before the answer to the original complaint was due.

the case on the merits because the answer was filed more than 2 months in advance of the scheduled hearing and, further, that the Respondent communicated to counsel for the General Counsel respecting its efforts to provide an accurate answer to the amended complaint. Thus, we find that no party to the proceeding was prejudiced. Finally, Section 102.121 of the Board's Rules states that our Rules and Regulations "shall be liberally construed to effectuate the purposes and provisions of the Act" and, based on the particular circumstances here, we believe that the Respondent's answer should be accepted. Accordingly, we shall deny the General Counsel's Motion for Summary Judgment.

#### ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 31 for further appropriate action.

MEMBER TRUESDALE, dissenting.

Contrary to my colleagues, I would grant the General Counsel's Motion for Summary Judgment. Section 102.111 (c) of the Board's Rules and Regulations provides in part that:

In unfair labor practice proceedings, motions, exceptions, answers to a complaint or backpay specification, and briefs may be filed within a reasonable time after the time prescribed by these rules only upon good cause shown based on excusable neglect and when no undue prejudice would re-

sult. A party seeking to file such . . . answers . . . beyond the time prescribed by these rules shall file, along with the document, a motion that states the grounds relied upon for requesting permission to file untimely. The specific facts relied on to support the motion shall be set forth in an affidavit form and sworn to by individuals with personal knowledge of the facts.

The Respondent has failed to file a timely answer to either the original complaint, the first amended complaint, or the extension granted by the General Counsel in his warning letter of July 13. No extension of time for filing its answer was requested, and the Respondent's late-filed answer to the first amended complaint failed to comply with the Board's Rules requiring a motion and affidavit demonstrating good cause for the failure to file a timely answer. Instead, the Respondent has done no more than assert in its brief in opposition to the General Counsel's Motion for Summary Judgment that its failure to file a timely answer was the result of a "misunderstanding" which was clarified by its attorney's personal conversation with counsel for the General Counsel indicating that the Respondent's answer was being sent. In my view, the Respondent's communications with the Regional Office fall far short of the showing the Rules require. In light of the clear notice given to Respondent of its obligation to file a timely answer, the unsubstantiated claim of a mere misunderstanding does not constitute good cause for the Respondent's late filing. Accordingly, I would grant the General Counsel's Motion for Summary Judgment.